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NTSB Order No. EA-5302

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
WASHINGTON, D.C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D.C.
on the 31st day of July, 2007

MARION C. BLAKEY, Administrator, Federal Aviation Administration, Complainant, v. JOHN J. GLENNON and KEITH M. SHEWBART, Respondents.	Dockets SE-17500 and SE-17615

OPINION AND ORDER

The Administrator and respondents have appealed from the oral initial decision of Administrative Law Judge William E. Fowler, Jr., issued on March 8, 2006, following an evidentiary hearing.[1] The law judge found that the Administrator did not prove all allegations in her complaint, but that she established

[1] A copy of the initial decision, an excerpt from the hearing transcript, is attached. Respondents' appeals were consolidated for hearing.

that respondents violated two sections of the Federal Aviation Regulations, 14 C.F.R. § 121.639 and § 91.13(a), with regard to respondents' operation of a Delta shuttle flight from Ronald Reagan National Airport, Washington, D.C. (DCA) to LaGuardia Airport, New York (LGA).[2] The law judge also specifically found that the Administrator had not proven that respondents violated 14 C.F.R. § 121.627(a).[3] The law judge affirmed the suspension of Respondent Glennon's airline transport pilot (ATP) certificate, but reduced the suspension period from 120 days to 60 days; likewise, the law judge affirmed the suspension of Respondent Shewbart's ATP certificate, but reduced the suspension period from 45 days to 10 days. We remand for clarification, and any necessary further proceedings, in accordance with this decision.

The Administrator charged respondents with the violations described above as a result of respondents' operation of a Boeing

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[2] Section 121.639, entitled, "Fuel supply: All domestic operations," states that no person may dispatch or take off a domestic air carrier airplane unless it has enough fuel:

(a) [t]o fly to the airport to which it is dispatched;
(b) [t]hereafter, to fly to and land at the most distant alternate airport (where required) for the airport to which dispatched; and
(c) [t]hereafter, to fly for 45 minutes at normal cruising fuel consumption….

Section 91.13(a) prohibits careless or reckless operations so as to endanger the life or property of another.

[3] Section 121.627(a) states that no pilot-in-command (PIC) may allow a flight to continue toward any airport to which it has been dispatched or released if, in the opinion of the PIC or dispatcher, the flight cannot be completed safely; unless, in the opinion of the PIC, no safer procedure exists. In that event, § 121.627(a) provides that the continuation toward the airport is an "emergency situation," pursuant to § 121.557.

737-200 on November 3, 2004, from DCA to LGA (Delta Flight No. 1966). In articulating the basis for her complaint and appeal, the Administrator alleges that Mr. Steven Caisse, from Delta Dispatch, planned the fuel for Flight No. 1966 in a manner to ensure safe completion of the flight, with trip burn fuel, planned contingency fuel, unplanned contingency fuel, and reserve fuel, all of which totaled 11,000 pounds. Admin. Br. at 2; Tr. at 190-93, 196; Exh. A-15 at 4-5.7. This amount, combined with other factors, such as the amount of planned taxi fuel, resulted in a calculation of minimum takeoff fuel in the amount of 10,170 pounds. Tr. at 281. The Administrator asserts that, in general, crewmembers rely on the dispatcher for fuel planning. Tr. at 433, 453-54. The Administrator alleges that Flight No. 1966 was delayed in taking off, and that respondents subsequently accepted a clearance for an alternate route from the appropriate Air Traffic Control facility (ATC). The record indicates that respondents sent an Aircraft Communications Address & Reporting System (ACARS) message to Delta Dispatch, informing Mr. Caisse of the route change, and stating that the aircraft now had 10,500 pounds of fuel. Exh. A-18 at 5 (ACARS message transcript); Tr. at 206-207. Mr. Caisse then inserted the new route plan into his flight planning computer, and determined that the aircraft had insufficient fuel for the alternate route. Tr. at 208-209; Exh. A-19. Mr. Caisse sent an ACARS message to respondents, conveying that they had insufficient fuel and would need to refuse the ATC clearance for the alternate route. Exh. A-18 at 6; Tr. at 209-210. The Administrator alleges that respondents had already

taken off at the time Mr. Caisse sent the message to respondents indicating that they did not have a sufficient amount of fuel for the alternate route. Tr. at 210.

At the administrative hearing, Respondent Glennon testified that, had he received the message before taking off, respondents would not have accepted the takeoff clearance, but would have tried to resolve the discrepancy as to the amount of fuel necessary for the alternate route. Tr. at 438-39. After ATC granted respondents' request to fly to a particular intersection, which cut approximately 40 miles off the total trip, and to alter their cruising altitude from 21,000 to 27,000 feet, Mr. Caisse determined that Flight No. 1966 did indeed have sufficient fuel. Exh. A-18 at 7; Tr. at 212. Upon respondents' approach to LGA for landing, however, Flight No. 1966 experienced arrival delays; consequently, respondents informed ATC that they did not have enough fuel to accept a heading change, as ATC had directed them to do. Exh. A-8 at 4 (ATC transcript). Respondents had also previously informed ATC that they were "tight" on fuel. Exh. A-3 at 2; Exh. A-4 at 2. Approximately one minute after informing ATC that they did not have enough fuel to turn left heading 270, respondents declared a fuel emergency. Tr. at 102-103. As a result, the Administrator alleges that ATC provided an expedited route for landing, and delayed the landing of other aircraft at LGA to allow Flight No. 1966 to land. Tr. at 137.

The Administrator's Appeal

The Administrator contends that respondents failed in numerous aspects of their operation of Flight No. 1966. The

Administrator appeals the law judge's decision with regard to his apparent conclusion that respondents did not take off without the minimum fuel required, and as to the reduction in the suspension times of their ATP certificates. The Administrator asserts that the fuel plan called for 10,170 pounds as the minimum amount of fuel required for takeoff for the original route, and that the alternate route required 11,770 pounds of fuel. The Administrator alleges that respondents took off with 10,500 pounds of fuel.[4] Admin. Appeal Br. at 22-23; Tr. at 282. The Administrator asserts that respondents' use of the planned contingency fuel, in order to justify the route change, was impermissible. Admin. Appeal Br. at 25.[5] The Administrator argues that operators must intend to use planned contingency fuel in circumstances involving unplanned airborne contingencies, rather than as a substitute for the amount of takeoff burn fuel that the aircraft may use while on the ground. Overall, the Administrator argues that respondents violated § 121.639 because they took off without the minimum amount of fuel, and that Respondents Glennon and Shewbart are subject to suspensions of their ATP certificates for periods of 120 days and 45 days,

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[4] The Administrator notes that 14 C.F.R. § 121.647 requires persons who engage in fuel planning to consider (a) wind and other weather conditions forecast, (b) anticipated traffic delays, (c) one instrument approach and possible missed approach at destination, and (d) any other conditions that may delay the landing of the aircraft.

[5] The Delta Fuel Planning Manual, Exh. A-15 at 4-5.2, prohibits any conversion of planned contingency fuel into another category of fuel: "[planned contingency fuel] cannot be used prior to takeoff unless the captain has the concurrence of the dispatcher."

respectively.

Respondents dispute the Administrator's arguments, and their reply brief includes some procedural arguments.[6] With regard to the merits of the Administrator's appeal, respondents argue that she has not met her burden of proving that respondents took off without the minimum amount of fuel, because she has not introduced into evidence the dispatch release with the fuel levels for the aircraft and flight at issue, but instead relies on testimony that is "pure speculation." Consolidated Reply Br. at 4. Respondents also argue that the PIC did not use planned contingency fuel on the ground, and that respondents did not request shortcuts from ATC because they were low on fuel, but that they were attempting to save time and fuel, which is a common practice among operators. Respondents also assert that they did not declare an emergency situation due to a shortage of fuel, but instead had to use the word "emergency" to get ATC's attention. Respondents also argue that ATC made errors, and, further, that no aircraft were put into a holding situation as a result of respondents' expedited approach. In addition, respondents cite case law regarding the "sterile cockpit rule,"

[6] Respondents argue that the Administrator waived her allegation that respondents violated § 121.627(a), because she did not address it on appeal. Respondents also assert that the Administrator's reference to § 121.647 is inappropriate, because she did not allege any violation of § 121.647 in her complaint. In addition, respondents argue that the Board should interpret the law judge's decision as one that does not find a violation of § 121.639; therefore, respondents argue, we should dismiss the Administrator's complaint in its entirety, because the § 91.13(a) allegation cannot stand in the absence of another regulatory violation.

and argue that, until they reached 10,000 feet, the rule precluded them from discussing the fuel situation with Mr. Caisse. Finally, respondents argue that the re-route of Flight No. 1966 "was exactly the type of contingency" for which the planned contingency fuel was on board. Consolidated Reply Br. at 21.

Submission of Amicus Brief

Delta Air Lines, Inc. has filed a motion for leave to file a brief of amicus curiae (hereinafter, "amicus brief") in response to the Administrator's brief. Attached to Delta's August 25, 2006 motion for leave is the amicus brief, which urges us to dismiss the Administrator's complaint on the basis that her assertion that pilots cannot utilize planned contingency fuel for potential re-routes is directly contrary to Delta policy, and is unreasonable in application and practice.

The Board's Rules of Practice establish requirements for acceptance of amicus briefs. Specifically, 49 C.F.R. § 821.9(b) allows for the submission of an amicus brief if the brief is "accompanied by written consent of all the parties, or by leave of the General Counsel, if, in his or her opinion, the brief will not unduly broaden the matters at issue or prejudice any party to the proceeding." Section 821.9(b) also requires that the motion for leave and accompanying brief "shall be filed within the briefing time allowed the party whose position the brief would support, unless good cause for late filing is shown." We have previously accepted amicus briefs that meet these requirements. See, e.g., Administrator v. Darby Aviation, NTSB Order No. EA-

5159 (2005). However, as with our other Rules of Practice, we do not arbitrarily enforce procedural requirements regarding the filing of amicus briefs. See Administrator v. Stewart, NTSB Order No. EA-4479 at 4 n.4 (1996) (denial of request for leave to file an amicus brief that was one week late, absent showing of good cause for the delay). The Administrator opposes Delta's motion for leave to file the amicus brief, arguing that appeal and reply briefs were due by June 28, 2006, and August 28, 2006, respectively.

We have reviewed the record regarding the timeliness of and issues presented in this amicus brief, and decline to accept the brief. The timeliness of the amicus brief is questionable, at best, given the ambiguity in the date that we received it; we did not receive the original motion and accompanying brief directly from Delta, but received it from the Administrator. Moreover, Delta has not articulated good cause for any delay in their submission of the brief. In addition, the arguments in the amicus brief would impermissibly broaden the issue at hand by presenting arguments regarding certain categories of fuel, when the alleged regulatory violation concerns the overall calculation of the minimum amount of fuel needed for takeoff. See supra, note 2. Finally, our acceptance of the brief would prejudice the Administrator. Delta has not met the requirements in § 821.9(b) regarding the submission of amicus briefs; therefore, we must deny Delta's motion for leave to file the brief.

Respondents' Appeal

Respondents also appeal the law judge's decision, and argue

that the law judge erred in his determinations regarding whether respondents were required to obtain concurrence from Mr. Caisse at Delta Dispatch with regard to their route change, whether respondents violated § 121.639 and § 91.13(a), and whether they are jointly responsible for the fuel planning. In addition, respondents argue that the law judge did not set forth complete factual and legal conclusions in his decision.

First, respondents argue that Delta's Flight Operations Manual does not require pilots to obtain permission or concurrence from a dispatcher for route changes,[7] and that the testimony regarding this issue was not persuasive. Respondents contend that the Administrator's expert, Mr. Jack Corbitt, who is an aviation safety inspector in the Administrator's Garden City Flight Standards District Office in New York, did not provide persuasive testimony, because he never worked as a dispatcher, and never consulted Delta or familiarized himself with Delta's dispatch protocol during his investigation into the flight at issue. In addition, respondents assert that Delta conducted its own investigation into the circumstances of Flight No. 1966, and determined that concurrence from Mr. Caisse regarding the alternate route was not necessary.

Respondents also argue that Flight No. 1966 had sufficient

[7] Exhibit A-13, a section of Delta Flight Operations Manual, states that the captain is responsible for "[c]oordinating with the Dispatcher of any significant route changes, maintenance, irregularities, etc. that may affect the flight or impact downline operations, to include: Lateral changes from planned route of flight by more than 100 nm … Any change that will cause the flight to arrive at the destination or designated alternate airport with less than minimum FAR fuel reserves."

fuel on board, and that, therefore, respondents did not violate § 121.639 or § 91.13(a). In support of these arguments, however, they do not cite any exhibits, testimony, or other evidence in the record, but instead hinge their arguments on the lack of clarity in the law judge's decision. Respondents assert that the law judge's decision is confusing, and provides neither a complete articulation of the factual and legal findings, nor any reasonable basis for any of his conclusions. Respondents cite Administrator v. Wolf, 7 NTSB 1323, 1325 (1991), for the proposition that law judges must issue a comprehensive decision with complete findings of fact and conclusions of law, in order to allow parties to understand the basis for the decision. Respondents cite several examples in support of their argument that the law judge did not fulfill his duty of providing a complete, comprehensible decision. Based on these alleged errors, respondents urge us to reverse the law judge's decision.

Finally, respondents argue that both the PIC and the first officer, or second-in-command (SIC), should not be held jointly responsible for the decisions that Respondent Glennon, as PIC, made during the flight. Respondents assert that the Administrator has not proven that Respondent Shewbart, as SIC, violated any regulation or provision of Delta's Flight Operations Manual. Respondents cite Administrator v. Hart, 2 NTSB 1110, 1112-1113 (1974), for the proposition that all requirements should articulate the duty that an airman must fulfill with enough specificity to notify the airman that failure to fulfill the duty could result in punitive action. Respondents argue that

the lack of any specific, written guidance in the Flight Operations Manual that would require an SIC to engage in a review of the fuel requirements indicates that Respondent Shewbart is not jointly responsible for any violation, should the Board determine that a violation did occur.

The Administrator opposes each argument, and alleges that the route change required concurrence from Mr. Caisse at Delta Dispatch, according to Delta's Flight Operations Manual. See supra note 7. The Administrator argues that it was inappropriate for respondents to avoid responding to Mr. Caisse's direction to refuse the alternate route, even though Respondent Glennon, who was PIC of Flight No. 1966, testified that the sterile cockpit rule precluded him from responding or communicating with Mr. Caisse at the beginning of the flight. Tr. at 389.

With regard to respondents' argument that they did not violate § 121.639 or § 91.13(a), the Administrator argues that the 97-mile route change caused a significant increase in fuel consumption because, after Mr. Caisse received notification of the change, he determined that the aircraft had insufficient fuel. Tr. at 208-209, 293, 296; Exh. A-19. The Administrator also asserts that respondents were obligated to declare their "minimum fuel" status before declaring a fuel emergency. Exh. A-2 (Section 7110.65 of Air Traffic Control Handbook, defining "minimum fuel"); Exh. A-25 (Section 10-1.7 of Delta Emergency Operations Manual, which states, "declaring minimum fuel should be done in time to prevent the development of an emergency fuel condition"). In addition, the Administrator argues that

respondents violated § 91.13(a), because, had they waited two minutes before taking off, they would have learned from Mr. Caisse that they did not have a sufficient amount of fuel on board. The Administrator contends that, because their flight was delayed in taking off, respondents wanted to arrive at LGA as quickly as possible, and therefore engaged in careless and reckless conduct in an effort to make up the time they lost due to the initial delay.

With regard to respondents' argument that the ambiguity in the law judge's decision is grounds for our reversal of the decision, the Administrator argues that the Wolf case states that the Board may come to its own conclusion regarding an alleged violation, based on the evidence in the record. Finally, the Administrator also alleges that the PIC and SIC are jointly responsible for ensuring that the aircraft has the minimum amount of fuel that it needs for takeoff. The Administrator bases this argument on the Flight Operations Manual, which states that the SIC is responsible for assisting the PIC in the "safe and efficient operation of the aircraft while performing assigned duties," and that the SIC must immediately inform the PIC of "unsafe conditions or improper handling which could place the aircraft in jeopardy." Exh. A-26 at 2. The Administrator urges us to conclude that she has established that respondents violated § 121.639 and § 91.13(a) by operating Flight No. 1966 without a sufficient amount of fuel.

We have previously remanded cases in which the law judge did not address inconsistencies in evidence, or failed to base his

decision on the appropriate standard or on facts in the record. See, e.g., Administrator v. Tarascio, NTSB Order No. EA-5165 at 2 (2005); Administrator v. Abiraman, NTSB Order No. EA-4978 at 2 (2002). We have reviewed the law judge's decision here and have determined that due process requires us to remand this case, with instructions that the law judge fully consider the evidence in the record, provide a detailed assessment of his findings of fact, and provide logical and reasoned explanations to support his conclusions.

We direct the law judge to consider case law that includes interpretations of § 121.639. In particular, we have previously held that the unforeseeable use of planned contingency fuel may result in a need to declare an emergency or take other similar action, and that a failure to take such action could result in a finding that pilots were careless and reckless. Administrator v. Gaugler, 4 NTSB 1229, 1232-34 (1984). We have also held, however, that the absence of a full fuel reserve does not automatically establish the existence of a "critical fuel situation." Administrator v. Morris & Wallace, NTSB Order No. EA-4955 at 2 (2002). In this regard, we note that determining whether a violation of § 121.639 has occurred is a fact-specific inquiry; as such, the initial decision that is available for the Board's review on appeal must contain a detailed assessment of the facts, and a thorough application of the law to the facts. See Administrator v. Nurnberger, 3 NTSB 705, 707 (1977) (determining whether operator has sufficient fuel on board aircraft may turn on a credibility assessment).

Finally, the law judge must also provide an assessment of the reasons for his selection of sanction, to the extent that it allows the Board to determine whether the sanction is reasonable.

Based on the foregoing, we direct the law judge to provide a clarified, well-reasoned decision that is appropriate for our review, should the parties decide to appeal the remanded decision to the Board.

ACCORDINGLY, IT IS ORDERED THAT:

This case is remanded to the law judge for further proceedings consistent with this opinion and order.

ROSENKER, Chairman, SUMWALT, Vice Chairman, and HERSMAN, HIGGINS, and CHEALANDER, Members of the Board, concurred in the above opinion and order.